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Supreme Court, U.S.
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011281 FEB 28 2002

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2001

CHAD LOUIS MAXWELL,

Petitioner,

vs.

IN THE MATTER OF THE ADOPTION OF C.D.M., a minor child, KORI RENE WYMAN and DAVID LEE WYMAN,

Respondents.

Petition for a Writ of Certiorari to the Oklahoma Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Christopher A. Wood
Counsel of Record
1303 N. Western
Oklahoma City, OK 73106
(405) 525-5005
Attorney for Petitioner

75pp

QUESTIONS PRESENTED

I. Whether the Oklahoma Supreme Court's interpretation of 10 O.S. Supp. 1998 §7505-4.2 as not allowing a defense of incarceration to the willful failure to maintain a relationship requirement violated the Fourteenth Amendment Due Process Clause of the U.S. Constitution.

II. Whether the Oklahoma Supreme Court's interpretation of the willful requirement of 10 O.S. Supp. 1998 §7505-4.2 is in conflict with the settled law of other jurisdictions, specifically with South Carolina statute SC ST § 20-7-1572(3) and the decision of other states, so as to create a conflict involving a Fundamental Constitutional Right that this Court should settle.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgement is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Appendix A- District Court Order Granting the Adoption without Mr. Maxwell's Consent dated June 23, 2000.

Appendix B- Opinion of the Oklahoma Court of Civil Appeals dated February 6, 2001.

Appendix C- Majority Opinion of the Supreme Court of Oklahoma dated December 4, 2001.

Appendix D- Dissent Opinion of the Supreme Court of Oklahoma dated December 4, 2001.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Chad Louis Maxwell, respectfully petitions for a writ of certiorari to review the judgement and opinion of the Oklahoma Supreme Court entered in this proceeding on December 4, 2001.

OPINIONS BELOW

The Oklahoma District Court's decision to allow the adoption of C.D.M. without Mr. Maxwell's consent entered on June 23, 2000 (Appendix "A"). The Oklahoma Court of Civil Appeals decision reversing the order of the District Court on February 6, 2001 (Appendix "B"). The Oklahoma Supreme Court granted judgement in favor of the Wymans, reversing the Court of Civil Appeals, on December 4, 2001 (Appendix "C"), as well as, the dissenting opinion entered on the same date (Appendix "D").

STATEMENT OF JURISDICTION

The date of the judgement sought to be reviewed is December 4, 2001. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the final judgement. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATE STATUTES & U.S. CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of 10 O.S. Supp. 1998 §

7505-4.2(H) is set forth below:

> "Consent to adoption is not required from a parent who willfully fails to maintain a significant relationship with a minor through visitation or communication for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child."

The pertinent provision of SC ST § 20-7-1572(3) is set forth below:

> "The family court may order the termination of parental rights upon a finding of one or more of the following grounds and a finding that termination is in the best interest of the child: (3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has wilfully failed to visit the child. The court may attach little or no weight to incidental visitations, but it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit"

The pertinent provision of the U.S. CONST. Amend. XIV § 1 states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, hereinafter, Maxwell, is the biological father of CDM, born January 8, 1996. Maxwell and the mother lived together approximately six months after the birth of CDM. August 2, 1996, the mother obtained a Permanent Victim Protective Order(VPO) against Maxwell. The state court VPO prohibited Maxwell from visiting or communicating with either the mother or CDM. Despite the VPO Maxwell continued contact. June 4, 1997 Maxwell filed a Petition to Establish Paternity and requested visitation with CDM. September 24, 1997, a state court Temporary Order denied Maxwell visitation with CDM. In November 1998, Maxwell began serving a sentence for violation of the VPO.

The Sentence prohibited Maxwell from contact with mother. November 10, 1999, the Public Defender appointed to represent Maxwell signed a Decree Establishing Paternity which also denied visitation.

February 11, 2000, Respondents filed their Petition for Termination of Rights and Application for Adoption Without Consent of Alleged Natural Father, based upon a failure to pay child support and a willful failure to maintain a relationship. At trial, May 26, 2000, the Respondents abandoned the claim based upon failure to pay child support. The Court, however, determined CDM was eligible for adoption without the consent of Maxwell, based upon 10 O.S. §7505-4.2(H), that Maxwell willfully failed to maintain a significant relationship with CDM between December 11, 1998 and February 11, 2000. During the entire relevant period, Maxwell was incarcerated and prohibited from contact by three state court orders; the VPO, the Paternity Order and the Sentence. On June 23, 2000, the Order Determining

Child Eligible for Adoption without Consent of the Natural Father and Determining that the Requested Adoption is in the Best Interest of the Child was filed. The issue of Maxwell failing to maintain a relationship was ruled upon as a matter of law based upon stipulated facts.

The Oklahoma Court of Appeals Reversed and Remanded on February 6, 2001 on the grounds that Respondents failed to establish the "willful" element of 10 O.S. §7505-4.2(H) because Maxwell's incarceration was from official state action, and precluded his visitation and communication with CDM. The Oklahoma Supreme Court accepted certiorari and ruled on December 4, 2001. The court held that a father who is incarcerated may not rely on court orders, that prohibited contact, as a defense to willful failure to maintain a relationship as a basis for termination of parental rights.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because, pursuant to

28 U.S.C.A. S CT Rule 10(b) and (c), there is a violation of a fundamental Constitutional right. Parenting has long been determined to be a fundamental right under the Fourteenth Amendment of the U.S. Constitution, and the Oklahoma Supreme Court's interpretation of 10 O.S. Supp. 1998 § 7505-4.2(H) violates Mr. Maxwell's due process under said Fourteenth Amendment. Also, the Oklahoma Supreme Court's decision is in direct conflict with the laws and decisions of another states.

ARGUMENT

PROPOSITION I

The Oklahoma Supreme Court's denial of the defense of incarceration to the willful requirement of the statute violated Mr. Maxwell's Fourteenth Amendment due process rights.

The United State Supreme Court has historically recognized that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution.

Quilloin v. Walcott, 434 U.S. 246, 255, 98 S.Ct. 549, 554 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 845, 97 S.Ct. 2094, 2110 (1977); Moore v. East Cleveland, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935 (1977) (plurality opinion); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640, 94 S.Ct. 791, 796 (1974); Stanley v. Illinois, 405 U.S. 645, 651-652, 92 S.Ct. 1208, 1212-1213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 573-574 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626 (1923). Therefore, the relationship between a parent and his child is also a fundamental, constitutionally protected right. Quilloin, 434 U.S. at 255, 98 S.Ct. at 554; Cleveland Board of Education, 414 U.S. at 639-640, 94 S.Ct. at 796; Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972); Stanley, 405 U.S. at 651, 92 S.Ct. at 1212-1213; Prince, 321 U.S. at 166, 64 S.Ct. at 442; Meyer, 262 U.S. at 399-401, 43 S.Ct. at 626-627;

Matter of Guardianship of S. A. W., 856 P.2d 286 (Okla. 1993).

A parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18, 27, 101 S.Ct. 2153, 2159 (1981) quoting Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972).

State intervention to terminate the relationship between a natural parent and his child must be accomplished by procedures meeting the requisites of the Due Process Clause of the United States Constitution. Lassiter, 452 U.S. at 24-32, 101 S.Ct. 2158-2162.

A biological relationship is of constitutional significance because it offers biological parents a unique opportunity to develop these emotional bonds with their

children. Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985 (1983). The United States Supreme Court has recognized that fathers of children conceived and born out of wedlock gain from the biological connection a constitutionally protected opportunity to develop a relationship with the child. Lehr, 463 U.S. at 262, 103 S.Ct. at 2993-2994. The Oklahoma Supreme Court, by holding that incarceration is not a defense to the willfulness requirement in 10 O.S. Supp. 1998 § 7505-4.2(H), violated Mr. Maxwell's Constitutional right to have a meaningful opportunity to present his defense. The court has effectively held that the willfulness requirement in 10 O.S. Supp. 1998 § 7505-4.2(H) can be circumvented by a court order. Paragraph four of Justice Opala's dissent clearly recognizes that the Oklahoma Supreme Court's decision allows an end run around the Constitution by "inviting as well as licensing" a custodial parent to use a Victim Protection Order to destroy a noncustodial parent's legal rights. (Appendix D). The court's decision has basically

told custodial parents that if they can get a court order forbidding the noncustodial parent visitation for at least a year, they can in turn terminate their parental rights as well.

PROPOSITION II

The Oklahoma Supreme Court has interpreted a Fundamental Constitutional right in a way that conflicts with the decisions of other states.

The decision of the Oklahoma Supreme Court in the instant case is that the state can prohibit a parent from having any contact with their child, and then based upon that court ordered lack of contact terminate their parental rights. Other states, such as South Carolina, specifically exclude termination when the lack of contact is from a state court order. The South Carolina statute, SC ST § 20-7-1572(3), sets forth a specific exception to their willfulness language that states that the parent must be shown not to have been prevented from visitation because of a court order. The Oklahoma statute contains the same willfulness language, however, contains no exception for court orders, and the

Oklahoma Supreme Court specifically forbids the use of court orders as a defense to the willfulness requirement. The Supreme Court of Utah has interpreted their termination statute based upon desertion as not allowing termination based upon incarceration. In re Adoption of Jameson, 20 Utah 2d 53, 432 P.2d 881 (1967). Following Jameson, the Utah Court of Appeals, in State of Utah v. K.H.C., 940 P.2d 1229, 1234-35 (Utah 1997) stated:

> "Other authorities have come to the same conclusion as the Utah Supreme Court did in Jameson, holding that the imprisonment of a parent is not willful conduct and, therefore, does not inevitably result in the loss of that parent's right to consent to an adoption. *See, e.g.*, *R.N.T. v. J.R.G.*, 666 P.2d 1036, 1039 (Alaska 1983); *Harden v. Thomas*, 329 So.2d 389, 390-91 (Fla.Dist.Ct.App.1976); *Murphy v. Vanderver*, 169 Ind.App. 528, 349 N.E.2d 202, 203 (1976); *In re Adoption of McCray*, 460 Pa. 210, 331 A.2d 652, 655 (Pa.1975); *Elliott v. Maddox*, 510 S.W.2d 105, 107 (Tex.CIv.App.1974)."

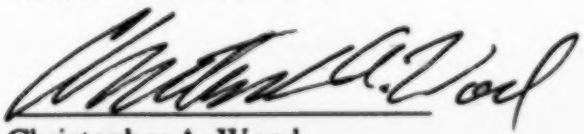
Because these statutes and cases are obviously at odds with each other, and deal with a fundamental right under the U.S. Constitution, as discussed above, this Court needs to settle

whether there is a defense of following a court order available in termination of parental rights cases.

CONCLUSION

For the foregoing reasons, the petitioner prays that this Honorable Court grant the writ of certiorari.

Respectfully submitted,



Christopher A. Wood
1303 N. Western
Oklahoma City, OK 73106
(405) 525-5005

APPENDIX "A"

ORDER FILED JUNE 23, 2001

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

IN THE MATTER OF,	)	
THE ADOPTION OF,	)	
COLTON DANIEL,	)	**Case No. FA-2000-067**
MAXWELL,	)	
a minor child.	)	

ORDER DETERMINING CHILD ELIGIBLE FOR ADOPTION WITHOUT CONSENT OF THE NATURAL FATHER AND DETERMINING THAT THE REQUESTED ADOPTION IS IN THE BEST INTEREST OF THE CHILD

On the 26th day of May, 2000, this matter came on for trial before the Honorable Carol Ann Hubbard. The Petitioners, Kori R. Wyman and David L. Wyman, appeared in person and with counsel, Laura Haag McConnell and Melissa B. Heindselman. The Respondent, Chad L. Maxwell, appeared in person and with counsel, Christopher Wood. The attorney for the child, Richard E. Smalley, appeared in person. The Court heard the evidence presented, the stipulations of the parties, the

testimony of sworn witnesses, and the arguments of counsel, and based thereon, finds as follows:

1. That the Petitioners have met their burden to show that the natural father has willfully failed to maintain a significant relationship with the minor child for 12 of the 14 months immediately preceding the filing of the Petition for Adoption herein, and the child is eligible for adoption without the consent of the natural father, pursuant to 10 Okla. Stat. §7505-4.2 (H).

2. That the Petitioners have met their burden to show by clear and convincing evidence that it is in the best interest of the minor child, Colton Daniel Maxwell, that the Petitioner, David L. Wyman, be permitted to adopt the child. The hearing on the final decree of adoption should be set by the Petitioners, and notice of the hearing should be provided to counsel for Respondent.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated this 22 day of June, 2000.

Judge Carol Ann Hubbard

APPROVED AS TO FORM:

Laura Haag McConnell, OBA#12394
Melissa Beeson Heindselman, OBA#17797
HARTZOG CONGER & CASON
201 Robert S. Kerr
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
405-235-7000
405-235-7329 (fax)
ATTORNEYS FOR PETITIONERS

Christopher A. Wood, OBA#12936
1303 N. Western Ave
Oklahoma City, Oklahoma 73106
(405) 525-5005
(405) 521-8567 (facsimile)
ATTORNEYS FOR RESPONDENT, CHAD LOUIS MAXWELL

Richard Smalley, OBA#13351
3601 N.W. Classen, Suite 108
Oklahoma City, OK 73118
(405) 528-6300
ATTORNEY FOR MINOR CHILD

APPENDIX "B"

ORDER FILED FEBRUARY 6, 2001

NOT FOR OFFICIAL PUBLICATION

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF THE, ADOPTION OF C.D.M., a minor, child, KORI REFE WYMAN, and DAVID LEE WYMAN,	)	
Petitioners/Appellees,	)	
vs.	)	**Case No. 94, 897**
CHAD LOUIS MAXWELL,	)	
Respondent/Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HONORABLE CAROL A. HUBBARD, TRIAL JUDGE

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

Laura Haag McConnell
HARTZOG, CONGER & CASON

Oklahoma City, Oklahoma
For Petitioners/Appellees

Christopher A. Wood
CHRISTOPHER A. WOOD &
ASSOCIATES, P.C.
Oklahoma City, Oklahoma
For Respondent/Appellant

OPINION BY KEITH RAPP, JUDGE:

The trial court respondent, Chad Louis Maxwell (Maxwell), appeals a decision which determined, based upon the petition of Kori Wyman (Mother) and her husband David Lee Wyman (Wyman), that his child, C.D.M., was eligible for adoption without his consent because he had wilfully failed to maintain a significant relationship with the child for twelve of the previous fourteen months and that it is in the best interests of the child that adoption proceed.[1]

BACKGROUND

[1] C.D.M. was represented at trial by a guardian ad litem who was also an attorney. That representative has not appeared in this appeal and the record does not reflect any permission to withdraw. Thus, the child is not represented here.

The parties stipulated to the facts. Maxwell has not seen the child, born in January 1996, since the child was about 6 months old. He has been incarcerated since November 1998. The parents never married. Then, in August 1996, at Mother's instance, a protective order was entered against Maxwell, which barred him from contact with Mother and visitation with C.D.M.

Maxwell claims his lack of contact and relationship with C.D.M. were due to:

- The August 2, 1996 protective order prohibiting him from contacting or communicating with C.D.M. and the mother.

- A Judgment and Sentence entered on March 12, 1998 and filed June 8, 1998, against him for misdemeanors of battery and violation of the protective order and which specifically prohibited contact with the Mother.

- A decree in paternity action initiated by Maxwell on June 4, 1997, which determined paternity but which also denied his visitation. A temporary order entered in that action also denied visitation. The decree was filed

December 2, 1999, and the temporary order was filed on October 29, 1997.

- His incarceration for all of the 14 month period in question. The incarceration was due to is violation of the protective order, consisting of trespass and stalking, and the above conviction for violation of the protective order consisting of trespass and battery. The felony conviction arose out of events in which Maxwell admitted breaking into Mother's apartment. He further admitted a prior break-in and he testified that on these occasions he was not trying to see the child. Maxwell began serving his incarceration in November 1998.

Maxwell had no communication with the child during the relevant fourteen month period. He did not seek modification of the protective order to seek communication or alternative contact with the child, but he did unsuccessfully seek visitation in a paternity action he filed after being charged with violation of the Protective Order. During the relevant period Maxwell's mother had approximately five visits with the child and passed information to Maxwell. Maxwell's sister asked Mother for

permission to take the child to the prison to visit but Mother refused permission. Maxwell provided minor financial support including having his family sell his personal property and send the proceeds.[2]

The parties presented evidence on the issue of whether adoption was in the best interests of C.D.M. However, detailed recital of this background is unnecessary in light of this Court's ruling on the remaining issue.

The trial court ruled that Maxwell had not maintained a significant relationship with the child for the requisite period. Then, after additional evidence was presented, the court ruled that adoption was in the best interest of C.D.M.,

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[2] During the hearing, and after receiving stipulations, the trial court ruled that Maxwell had failed to maintain a significant relationship with the child. The temporary order of September 24, 1997, in the paternity action ordered Maxwell to pay $141.80 per month child support. The final decree ordered child support of $125.00 per month beginning December 1, 1999. The evidence reflected sporadic payment of the initial support but an arrearage. Two payments of $125.00 each in December 1999 were received by Mother from Maxwell's mother and an earlier payment, sent by Maxwell's sister in July 1999, of $160.00 was apparently from sale of Maxwell's personal property. The issue of wilful failure to provide support was contested, but then withdrawn after the trial court ruled on the significant relationship question.

and without the consent of Maxwell. Maxwell appeals.

STANDARD OF REVIEW

Where the facts are not disputed an appeal presents only a question of law. Baptist Building Corp. v. Barnes, 1994 OK CIV APP 71,¶ 5, 974 P.2d 68, 69. The appellate court has the plenary, independent and nondeferential authority to reexamine a trial court's legal rulings. Neil Acquisition, L.L.C. v. Wingrod Investment Corp, 1996 OK 125, 932 P.2d 11 00,n.1. Otherwise, the dual determinations that an adoption is in the best interest of the child and that a parent's consent to adoption is unnecessary are questions of fact. In re Adoption of J.R.M., 1995 OK 79, ¶ 9, 899 P.2d 1155, 1158; In re Adoption of Baby Boy W., 1992 OK 58, ¶ 16, 831 P.2d 643, 646. The magnitude of the rights involved requires proof that is clear and convincing. Adoption of R.W.S., 1997 OK 148, ¶ 10,951 P.2d 83, 85; See In re Adoption of Darren Todd H., 1980 OK 119, ¶ 10, 615 P.2d 287, 290. An appellate court will examine the trial court's

conclusion regarding a child's eligibility for adoption without the consent of the biological parent to determine if it is supported by the clear weight of the requisite clear and convincing evidence. White v. In the Matter of the Adoption of Baby Boy D., a/k/a R.D.W., 2000 OK 44, ¶ 35, 10 P.3d 212, 219; Matter of Adoption of R.W.S., 1997 OK 148, ¶ 10, 951 P.2d 83, 86; In re Adoption of Blevins., 1984 OK CIV APP 41, ¶ 9, 695 P.2d 556, 560. The adoptive parents bear the burden of proving by clear and convincing evidence that the natural's parent's consent is not necessary. See Merrell v. Merrll, 1985 OK 107, ¶ 4, 712 P.2d 35, 37.

ANALYSIS AND REVIEW

Need For Father's Consent

The parties stipulated that Maxwell was prevented from maintaining contact with his child by official acts represented by courts orders. Moreover, these court orders

were brought about by his own conduct.[3] It is undisputed that Maxwell, due to the continuing Protective Order, was precluded from communication with his child. Also, he has no right to visitation either because of the paternity case or the fact of is incarceration. An incarcerated person does not have an absolute right to visitation. Harmon v. Harmon., 1997 OK 91, ¶ 14, 943 P.2d 599, 604-05.

The issue for resolution is whether Maxwell's failure to visit or communicate with the child during the relevant period was willful.[4] The fourteen months began December 11, 1998, and ended on February 11, 2000, when the petition was filed.

This Court holds that where official acts prevent a

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[3]This conduct began a few months after the child's birth. It appears that Maxwell attended to his responsibilities prior to birth and shortly afterward. Thus, cases involving failures by unwed fathers to undertake parental responsibility at this stage are inapplicable here.

[4]Hence, the question of the meaning of the phrase "maintain a significant relationship" need not be decided. See Baxter v Reynolds, 1999 OK CIV APP 104, 990 P.2d 316, where the Court examined the facts of that particular case to determine whether the father there had maintained such a relationship.

parent from maintaining contact with a child, dispensing with that parent's consent to adoption may not be based upon such lack of contact alone.[5] This Court further holds that when additional evidence, measured by the applicable standard of proof and focused on the totality of the conduct of the parent during the relevant period, demonstrates a conscious disregard of that parent's parental obligations and duties, then a finding of willful failure to maintain a significant relationship through visitation or communication will be upheld.[6] In this regard, it is relevant to examine the parent's

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[5]Official acts include, for example, incarceration and, as here, court orders precluding contact or communication.

[6]The trial court was presented tow unpublished Opinions from the Oklahoma Court of Civil Appeals, recognizing, however, that they were not precedent. In one, Matter of J.D.H, 92,767, the child was a baby and the parent was incarcerated, but had sent cards and letters to be read to the baby. There, the Court ruled that the petitioners for adoption had failed to show willful failure to maintain a significant relationship. In the second, Matter of Adoption of K.D., 92,824, child was also a baby and the parent was incarcerated. In that case the Court emphasized that the parent did absolutely nothing, including not even making any inquiries, about maintaining a relationship with the child. There, the Court ruled that consent to adoption was not necessary.

In neither of these cases were the parents under some form of official constraint that precluded or impeded communication and visitation with the child. The facts of these cases show a bracket of an

efforts to carry out his or her parental responsibilities even though such efforts may be unsuccessful.

Here the trial court ruled that CDM was eligible for adoption without Father's consent and made that ruling under the authority of 10 O.S. Supp. 1999,§ 7505-4.2(H).[7] This statute provides:

> H. Consent to adoption is not required from a parent who willfully fails to maintain a significant relationship with a minor through visitation or communication for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child.

Moreover, the Legislature has provided that among the purposes of the Oklahoma Adoption Code is to:

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incarcerated parent's activity toward maintaining a relationship, ranging from modest effort through cards and letters to absolutely nothing.

[7]Renumbered from 10 O.S. Supp. 1993, § 60.6, and amended by Laws 1997, c. 366, § 27, eff. November 1, 1997. That amended version did not contain the provision for adoption without the consent of a parent for failure to maintain a "significant relationship" with the children. A second amendment of that statute, effected by Laws 1997, c. 366 §§ 27, 58, eff. November 1, 1997, added the "significant relationship" provision. The statute was subsequently amended by Laws 1998, c. 5, § 9, emerg. Eff. March 4, 1998, and by Laws 1998, c. 415, § 21, eff. June 11, 1998.

> 3. Affirm the duty of a noncustodial parent to:
>
> ....
>
> b. Maintain a parent-child relationship, regardless of the absence of any court order to that effect.

10 O.S. Supp. 1999, § 7501-1.2(A)(4)(b).

The meaning of the term "willfully," as used in the statute, is not otherwise defined. Hence, the term will be construed in its ordinary sense. 25 O.S.1991, § 1. Thus, acting "willfully" may be equated to intentional action or something done deliberately. Webster's Third New International Dictionary (Merriam-Webster, Inc. 1986)

> Construing the word 'willfully" liberally, or in its broadest sense, willfully denotes an action proceeding from a conscious motion of the will. When the word is utilized in statues involving turpitude, it generally means with evil purpose, criminal intent, or the like, but it is often used without that implication in statutes denouncing acts not in themselves wrong.
>
> In such cases the word denotes that which is intentional, knowing or voluntary as distinguished from accidental, and characterizes conduct marked by careless disregard, whether or not one has the right to so act

Schaeffer v. Shaeffer., 1987 OK 30, ¶¶ 9-19, 743 P.2d 1038, 1040.

Authorities from a majority of other jurisdictions hold that when a parent is precluded from contact with a child by official action, such fact, alone, is insufficient to justify termination of parental rights or dispensation with consent to adoption. Additional evidence has been required in order to justify the conclusion that the parent has abandoned, deserted, or neglected parental responsibilities so as to justify termination of parental rights or dispensing wit consent to adoption. Peyla v. Martin., 40 III. App. 3d 373, 352 N.E.2d 644 n. 2 (Ind. App. 1995); Jordan v Hancock., 508 S.W.2d 878, 881 (Tex. C. App. 1974); State of Utah in the Interest of M.L.., 965 P.2d 551, 558 (Utah App. 1998); but see In the Matter of J.J.J.., 718 P.2d 948, 952 (Alaska 1986), where the Court ruled that the official action must be beyond the

parent's control and not the product of the parent's conduct.[8]

Here, the precise question deals with willful failure to maintain a significant relationship with the child through visitation or communication. The concern is whether the parent has demonstrated a reasonable decree of interest, concern or responsibility as to the child's welfare. See In the Interest of Deborah, Harold, Jr. and Agnes Woods., 54 Ill. App.3d 729, 733-35, 369 N.E.2d 1356, 1360-61. In Baxter v. Reynolds., 1999 OK CIV APP 104, 990 P.2d 316, the Court examined the total conduct and circumstances relating to the parent's relationship with the children.

Oklahoma Supreme Court cases involving willful failure of an incarcerated parent to provide financial support

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[8]The Alaska Court in J.J.J. clarified its earlier position presented in R.N.T. v. J.R.G. & M.I.G., 666 P.2nd 1036 (Alaska 1983), by incorporating the dissenting opinion from R.N.T. The dissenting opinion agreed that: "(1) parental conduct resulting in the loss of the right to consent to an adoption must be willful; (2) neglect of parental duties caused by imprisonment is not necessarily willful and does not inevitably result in the loss of a parent's right to consent; (3) imprisonment does not necessarily preclude conduct was not willful and argued that the parent's overall conduct should be examined. Id. at 1039-42.

are instructive. In those cases the Court has instructed that the proper inquiry is "whether the natural parent intentionally incapacitated himself for the purpose of avoiding the duty imposed by law" and, if so, then the incapacitation, or imprisonment, will justify adoption without the non-supporting parent's consent. Matter of Adoption of V.A.T., 1983 OK 23, ¶ 7, 660 P.2d 139, 141; see Matter of Adoption of J.R.M.., 1995 OK 79, 899 P.2d 1155, n. 14. Thus, there must co-exist intent, purpose, and duty.

Two of those there elements are clearly present here. Father certainly acted intentionally when created a need for protective orders and when he violated those orders. Thus, his inability to visit or communicate with the child whether due to incarceration or court orders still in effect during his incarceration, follows from his acts creating the need for the court orders and his acts in violation of those orders. The second element present, duty, follows from the statute which imposes the duty to maintain a significant relationship with

the child. 10 O.S. Supp. 1999, § 7501-1.2(A)(4)(b).

However, Father argues that the evidence does not prove that Father's intentional acts were done "for the purpose of avoiding the duty imposted by law." This represents the nub of Father's argument here-his acts were done in a misguided attempt to perform this duty and not to avoid that duty.[9] Stated in other words, Father's argument is that, notwithstanding his neglectful and bad conduct, he has neither abandoned nor deserted his child.[10] Therefore, he

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[9]Arguably, the events leading to Maxwell's misdemeanor conviction were related to an attempt to see his child, even though wrongful. However, the felony conviction followed his break-in to Mother's residence and Maxwell admitted that he did not expect to see the child on that occasion or on a prior occasion of another break-in when he was not caught.

[10]Maxwell cites Jordan v Hancock, 508 S.W.2d 878, 881 (Tex. C. App. 1974), where the Court noted that "it is conceivable that one's involvement in crime might reflect his misdirected concern for the welfare of his children, rather than his disregard for it." An issue there was whether Jordan's imprisonment precluded a determination of abandonment of his children. The Court ruled that the mere fact of imprisonment would be insufficient to establish abandonment but, on the other hand, that fact could be used along with other evidence to determine whether abandonment existed. Id. 508 S.W.2d at 881. This ruling is in accord with the general rule that "neglect of parental duties caused by imprisonment is not necessarily willful conduct and therefore does not inevitably result in the loss of a parent's right to consent

concludes that the adjudication of adoption without his consent is error.[11]

Again, the precise question here deals with willful failure to maintain a significant relationship with the child through visitation or communication. The concern is whether the parent has demonstrated a reasonable degree of interest, concern, or responsibility as the child's welfare.

Proper inquiry examines whether the parent had opportunity to assert his or her parental rights but failed to do

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adoption. State of Utah v. K.H.C., 940 P.2d 1229, 1234 (Utah C. App. 1997) and see S.L. v. State of Utah, 965 P.2d 551 (Utah C. App. 1998), where incarceration plus additional evidence of unfitness justified loss of parental rights.

[11]A difficulty with Father's argument is that the statute her does not make abandonment or desertion the requisite premises for allowing adoption without consent. The terms abandonment and desertion have been used interchangeably but are more precisely defined.

1 Abbott's Dictionary of Terms and Phrases defines 'Abandonment' as the relinquishment, surrender, or disclaimer of one's rights....and defines "desertion' as the abandonment of a relation or service in which one owes duties; the quitting, willfully and without right, one's duties; the withdrawal, unexcused, from the obligations of some condition or status.

Adkinson v. Adkinson, 68 Ariz. 159, 163, 203 P.2d 507, 509 (1949); Shumway v Shumway, 286 Ala. 302, 239 So.2d 562, 564 (1970).

so notwithstanding the official action. For example, such opportunity may arise , in the context of official action, by the parent seeking alternative forms of contact, by the parent making reasonable efforts to reform the conduct causing the official action, and by the parent seeking to modify through appropriate proceeding the official action orders or directive.

Here the facts do not present an instance where the child has been adjudicated as deprived with a remedial plan imposed upon the parent, who then must subsequently demonstrate compliance to avoid loss of parental rights. Nevertheless, it is incumbent upon the non-consenting parent to grasp parental opportunities an to take action to remove the impediment imposed by official conduct. The adoptive parents bear the burden of proving by clear and convincing evidence that the natural's parent's consent is not necessary. See Merrell v. Merrell., 1985 OK 107, ¶ 4, 712P.2d 35, 37.

Analysis of the Record

The trial here focused primarily upon two things-first,

the circumstances leading up to the imposition of the sundry court orders and the violation of the orders resulting in incarceration, and, second, the reasons why adoption by the child's stepfather would be in the best interests of the child. The "best interest" Issue is separate from the matter now under review.

The record contains little information about Maxwell's conduct while incarcerated. The record reveals the fact of incarceration, the official decrees that prevented visitation and communication with the child, and the following information.[12]

Maxwell in fact had no personal communication or visitation with the child for the requisite period. Maxwell's mother had five visits with the child between January and July 1999, and provided information to him about the child

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[12]See Note 6. Here, the evidence shows that Maxwell did not do as much as the parent in In the Matter of the Adoption of J.D.H. to maintain a relationship, yet it cannot be said that Maxwell did absolutely nothing, as had the parent in In the Matter of the Adoption of K.D.

from those visits, including pictures. She did not seek visitation for Maxwell directly from Mother but made requests through an attorney.

Maxwell visited regularly with three of his children by a former wife. His mother brought those children to see him at the prison until her new employment conflicted with visitation days.

Maxwell's sister asked Mother for permission to take the child to visit him. Mother refused. Subsequently Mother's attorney directed that the sister make no further contact.

Maxwell has not sent any form of communication to the child during the relevant period. However, the Protective Order specifically banned all communication.[13]

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[13]In argument to the trial court counsel for Mother asserted that Maxwell had full access to the mails and to a telephone to communicate with the child but never asked any court for permission to communicate in that manner. In response to the trial court's inquiry whether such argument had basis even though not specifically addressed in the parties' stipulations, counsel for Maxwell agreed that the argument was fair and reiterated that the parties had stipulated to the absence of communication. Nevertheless, despite the availability of facilities any

The Final Decree in the paternity action, filed in December 1999, about two months prior to the petition here, denies visitation and recites that the parties have agreed to all issues. Maxwell was represented by an attorney in that matter.

While incarcerated Maxwell lost his position at Vo-Tech due to a disciplinary problem. He had undergone some unspecified form of counseling.

The filed judgment here makes no specific findings regarding whether the official sanctions barring communication prevented Maxwell from exercising a reasonable degree of interest, concern, or responsibility as to the child's welfare. However, the trial court focused upon the conduct leading up to the Protective Order and mad the

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form of communication would violate the Protective Order. Mother argued that Maxwell had sent two letters before he was incarcerated without penalty thus apparently inferring that he could still do so. This simply placed Maxwell at the risk of whimsical enforcement of the Protective Order.

following ruling at trial.[14]

> To say that the VPO prevents him from establishing or maintaining a relationship with his child would simply be to ignore the fact that VPOs are not issued for no reason....it would be tantamount to just ignoring the fact that it was the Respondent's conduct directly vis-a-vis the child and the mother that resulted in the issuance of the VPO.
>
> And I think it would weigh heavily against, at least public policy, if not the law, to count to his credit the illegal acts of violating the VPO, and to construe those as....legitimate attempts, affirmative attempts to try to have this relationship.
>
> So, considering all of the stipulated facts and all of the stipulated exhibits with respect to the ground that he has failed to maintain a significant relationship with his child for twelve of the fourteen months preceding the filing of the Petition, based on all the stipulations of counsel, I think that as a matter of law, the ruling on that issue would be found to be in favor of the Petitioners.

Trial Court Error

First, the trial court, by focusing upon matters and events occurring prior to the fourteen month period, went beyond the time frame permitted by the statute. See Welch

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[14]Trail Transcript, page 80.

v. Welch., 1997 OK CIV APP 86, ¶ 4, 953 P.2d 62, 63; Waddle v. Waddle., 1994 OK Civ App 1, ¶ 26, 868 P2d 751, 754, in which this Court Limited the consideration to the statutory period for purposes of examining whether support hand been given to the child. Consequently, the history explains how Maxwell came to be in his situation, but that history does not address what he may have done about maintaining a significant relationship during the relevant fourteen month time frame.

Second, the fact that Maxwell has had no personal visitation or communication for the twelve months, while true, does not alone suffice to dispense with consent. The reason is that here official action precludes such visitation and communication. The Petitioners, as the parties with the burden of proof, needed to show that Maxwell, given the constraint of the sundry orders and his incarceration, nevertheless willfully failed to make efforts to demonstrate

his concern, interest, and responsibility for his child.[15] Instead, they and the trial court relied upon the admitted absence of contact and the underlying history.

However, the record does reflect some affirmative acts by Maxwell through his mother or sister which are tantamount at least to inquiry about the child. The appellate court will not make the first determinations of fact or make a decision on untried questions. This is the trial court's function. In general, however, because of the procedure they selected, the Petitioners here bear the burden of proof, regarding whether Maxwell was able to take positive, tangible steps to establish a significant relationship with his child by taking limited actions, recognizing the official constraints, to demonstrate his concern, interest, and responsibility for the child.

CONCLUSION

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[15]For example, in the case of The Matter of Adoption of K.D., 92,824, referenced in Note 6 and presented to the trial court the Court specially noted the absence of even any inquiry about the child.

Here, the Petitioners have failed to establish the element of willful failure to maintain a significant relationship with the child. Consequently, it is unnecessary to review the "best interest" element. The judgment of the trial court is, therefore, reversed and the case is remanded for further proceedings consistent with this Opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

STUBBLEFIELD, P.J., and TAYLOR, J., concur.

February 6, 2001

APPENDIX "C"

DISSENT FILED DECEMBER 4, 2001

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE, ADOPTION OF C.D.M., a, minor child, KORI RENE, WYMAN and DAVID LEE, WYMAN,	)	
Petitioners/Appellees,	)	No. 94,879
v.	)	
CHAD LOUIS MAXWELL,	)	
Respondent/Appellant.	)	

CERTIORARI TO THE COURT OF CIVIL APPEALS, DIVISION IV

Honorable Carol A. Hubbard, Trial Judge

¶0 The appellees, Kori Rene Wyman and David Lee Wyman (collectively Wymans/respectively mother and stepfather), filed a petition for the stepfather to adopt the mother's child (C.D.M./child), without the consent of the appellant, Chad Louis Maxwell (Maxwell/father). The Wymans asserted that the father's consent was unnecessary because he had wilfully failed to maintain a significant relationship with the child during the year before the petition was filed. The father insisted that because he was incarcerated, any lack of

relationship with the child could not have been wilful. The trial judge, Honorable Carol A. Hubbard, found the father's consent unnecessary and that the adoption was in the child's best interests. The Court of Civil Appeals reversed and remanded, finding that the Wymans failed to establish that the father wilfully failed to maintain a significant relationship with the child. We hold that: 1) a father who was denied visitation and who was incarcerated for stalking and assaulting the mother and violating a protective order which was entered to protect the child and its mother from the father's acts of violence may not rely on the existence of court orders to excuse his lack of relationship with the child; and 2) the trial court's determination that the adoption was in the best interests of the child is supported by the evidence.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

Laura Haag McConnell, Oklahoma City, Oklahoma, for Petitioners/Appellees
Christopher A. Wood, Oklahoma City, Oklahoma, for Respondent/Appellant

KAUGER, J.:

¶1 Two issues are presented: 1) whether a father who was denied visitation and who was incarcerated for stalking and assaulting the mother and violating a victim's protective order (VPO) which was entered to protect the child and its mother from the father's acts of violence may rely on court orders to excuse his lack of relationship with the child; and 2) whether sufficient evidence was presented to support a finding that the adoption is in the child's best interests. We hold that: 1) the father may not rely on the existence of court orders to excuse his lack of relationship with the child; and 2) the trial court's

determination that the adoption was in the best interests of the child is supported by the evidence.

FACTS

¶2 On February 11, 2000, the appellees, Kori Rene Wyman and her husband, David Lee Wyman (collectively Wymans/respectively mother and stepfather), filed a petition for the stepfather to adopt the mother's child (C.D.M./child) without the consent of the appellant, Chad Louis Maxwell (Maxwell/father).[1] In their petition, the Wymans asserted that the father's consent was unnecessary because he had for twelve months of the fourteen months immediately preceding the filing of the petition: 1) wilfully failed to maintain a significant relationship with the child; and 2) wilfully failed, refused, or neglected to contribute to the support of the child in substantial compliance with a court order.

A. Agreed Facts.

¶3 The parties jointly stipulated to several facts. On January 8, 1996, the mother gave birth to C.D.M. Maxwell is the biological father of the child. Since July of 1996, Maxwell has had no relationship with C.D.M. On August 2, 1996, a permanent protective order was entered against Maxwell in favor of the mother and the child. The order prohibited any contact or communication between Maxwell and either the mother or the child, with the provision that the order could be modified by an assigned Judge in any domestic proceeding

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[1]The child was represented at trial by a guardian ad litem who was also an attorney. The guardian ad litem did not appear in this appeal to represent the child.

between the parties.[2] Maxwell made no effort to contact the child. Maxwell wrote to the mother, but she took no steps to punish him for his violation of the protective order.

¶4 In March of 1997, Maxwell was arrested and charged with criminal trespass on the property of the mother, for felony stalking and repeatedly telephoning the mother, breaking into the mother's apartment and for hiding in her closet, and violating the permanent protective order. He pled guilty to the stalking charges and was sentenced to a five year suspended sentence except for the first three years. On June 4, 1997, Maxwell filed a petition to establish paternity and a request for visitation with the child. On October 29, 1997, a temporary order was entered which denied visitation and

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[2]The protective order provides in pertinent part:

". . . The Defendant is Ordered NOT TO ABUSE, INJURE, ASSAULT, MOLEST, HARASS, THREATEN OR OTHERWISE INTERFERE with the victims.

The Defendant is Ordered NOT TO VISIT OR COMMUNICATE with the Victim.

The Defendant is Ordered TO LEAVE AND STAY AWAY FROM THE RESIDENCE located at where the Plaintiffs reside.

The Defendant is Ordered to CEASE HARASSING the Victims.

The Defendant is Ordered to CEASE STALKING the Victims.

. . .

This Order specifically applies to the minor . . . and is subject to any appropriate modification, in writing, which may be made by the assigned judge in any domestic action between the parties." (Emphasis in original.).

ordered child support in the amount of $141.80 per month.

¶5 On March 12, 1998, Maxwell plead guilty to additional charges of assault and battery and another violation of the VPO stemming from an incident in which he assaulted and battered the mother in a convenience store parking lot and attempted to take the child forcibly from the mother's car. He was sentenced to one year. He began serving his sentences for his convictions in November of 1998. A decree establishing Maxwell as the father, but denying visitation was filed on December 2, 1999, and child support was set at $125.00 per month. Although he receives between $8.00 and $11.00 a month in wages at the prison, Maxwell has never forwarded any portion of his earning to the mother for child support. However, Maxwell's mother sent a money order dated September 21, 1999, for $160.00, checks for $125.00 on December 13, 1999, and December 29, 1999, respectively which was apparently from the sale of Maxwell's personal property.

B. Facts Reflected in the Record.

¶6 In addition to the stipulated facts, the record reflects that the mother was fourteen when she met Maxwell, a twenty-five-year-old, father of four children. They began dating, and the mother gave birth to C.D.M when she was seventeen. Maxwell stayed with the mother at her parents' house for about ten days after the child's birth. Although he visited periodically, the parents never married and the mother and Maxwell never lived together after the child's birth. When C.D.M. was six months old, the mother met and began dating the stepfather. They were married on May 7, 1998, and had a child together on December 14, 1998.

¶7 According to the mother, rather than spending time

developing a relationship with the child, Maxwell used any opportunity he could to pressure her to resume a relationship with him. After an incident in which Maxwell became intoxicated and threatened to keep the child in an effort to keep her from ending their relationship, she obtained the protective order because he was climbing on her roof, peeking in her windows and making harassing phone calls. He admitted that when he broke into the mother's apartment, he was not expecting to see or communicate with the child. Maxwell did not seek modification of the protective order to attempt to allow communication or any alternative contact with the child. In August of 1997, Maxwell followed the mother into a parking lot, opened her car door, pulled her from the car, threatened her and shoved her into a wall. He then got into the back seat of her car and attempted to remove the child from the car seat before leaving. Although Maxwell denies the mother's version of the events, he pled guilty to the charges stemming from the incident. The judgment and sentence regarding this incident specifically prohibited contact with the mother.

¶8 On October 30, 1997, Maxwell wrote a letter to the mother informing her that the child was covered by his medical insurance and requesting a photograph of the child. On December 15, 1997, he sent another letter inquiring about the child. The mother refused Maxwell's sister's request to take the child to visit Maxwell in jail, but she initially allowed his mother limited visitation with the child. Later, however, Maxwell's mother was asked not to contact the mother or the child.

¶9 At the hearing on the adoption without the consent of the father, the trial judge, based on the stipulated facts and exhibits, ruled in favor of the Wymans on the issue of whether Maxwell had maintained a significant relationship with the

child. As a result of the trial court's ruling, the Wymans subsequently withdrew and abandoned their argument regarding Maxwell's alleged failure to support the child. The trial court then heard evidence relating to whether the adoption was in the child's best interests.

¶10 On May 26, 2000, the trial court entered an order, determining that: 1) the child was eligible for adoption without the consent of the father; and 2) it was in the best interests of the child to permit the stepfather to adopt the child. The father appealed. The Court of Civil Appeals reversed and remanded, finding that the mother and stepfather failed to establish the element of wilful failure to maintain a significant relationship with the child. We granted certiorari on April 30, 2001.

I.

¶11 A FATHER WHO WAS DENIED VISITATION AND WHO WAS INCARCERATED FOR STALKING AND ASSAULTING THE MOTHER AND VIOLATING A PROTECTIVE ORDER WHICH WAS ENTERED TO PROTECT THE CHILD AND ITS MOTHER FROM THE FATHER'S ACTS OF VIOLENCE MAY NOT RELY ON THE EXISTENCE OF COURT ORDERS TO EXCUSE HIS LACK OF RELATIONSHIP WITH THE CHILD.

¶12 The Wymans assert that the adoption should proceed without the consent of the natural father because: 1) it is undisputed that Maxwell has had no relationship with the child since the child was six months old; 2) Maxwell wilfully and intentionally through illegal and threatening actions

sought to control and intimidate the mother, rather than seek modification of the protective order in an attempt to establish a relationship with the child; 3) Maxwell's conduct was wilful and intentional and he took actions which he knew would have the result of preventing a relationship with his child; and 4) to allow Maxwell to rely on his own illegal and threatening acts toward the mother and the child as a grounds to prevent adoption would violate public policy. Maxwell admits to the violations of the protective order, but characterizes his behavior as a misguided effort to see the child. He argues that his lack of relationship should be excused, not only by the fact that he was involuntarily incarcerated but also by the fact that court orders prohibited him from having any contact with the child.

¶13 The law presumes that consent of a child's natural parents is necessary before an adoption may be effected.[3] The exceptions to this presumption are found in 10 O.S. Supp. 1998 §7505-4.2.[4] Section 7505-4.2 provides the avenue by which adoptions may be obtained without prior consent of the parents which effectively terminates that parent's rights. One of the situations in which a nonconsensual adoption may be obtained under §7505-4.2(H)[5] is if a parent wilfully fails to

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[3] Matter of Adoption of R.R.R., 1988 OK 109, ¶6, 763 P.2d 94; Matter of Adoption of C.M.G., 1982 OK 156, ¶9, 656 P.2d 262.

[4] Title 10 O.S. Supp. 1998 §7505-4.2.

[5] Title 10 O.S. Supp. 1998 §7505-4.2(H) provides:

"Consent to adoption is not required from a parent who willfully fails to maintain a significant relationship with a minor through visitation or communication for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of

maintain a significant relationship with the child through visitation or communication for a period of twelve months out of fourteen months immediately preceding the filing of the petition for adoption. The burden is on the party seeking to adopt without consent to prove such adoption is warranted by clear and convincing evidence.[6] Accordingly, the decision of the trial court will not be disturbed unless it fails to rest on clear and convincing evidence.[7]

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the child."

The statute was renumbered from 10 O.S. Supp. 1993 §60.6, and amended by Laws 1997, c.366, §27, eff. November 1, 1997.

See also, 10 O.S. Supp. 1998 §7505-4.1(A), which provides in pertinent part:

> "If consent to adoption or permanent relinquishment for adoption has not been obtained from both parents of a minor who is the subject of a petition for adoption, and the rights of the nonconsenting parent or parents have not previously been terminated, the petitioner for adoption, a consenting parent, or a legal guardian or legal custodian of the minor may file an application to terminate the parental rights of the putative father. The grounds for terminating a putative father pursuant to this section shall be identical to the grounds for permitting an adoption without the consent of a parent pursuant to Section 7505-4.2 of this title."

[6]White v. Adoption of Baby Boy W., 2000 OK 44, ¶35, 10 P.3d 212; Matter of Adoption of R.W.S., 1997 OK 148, ¶10, 951 P.2d 83; Matter of Adoption of J.R.M., 1995 OK 79, ¶12, 899 P.2d 1155.

[7]White v. Adoption of Baby Boy W., see note 6, supra; Matter of Adoption of A.W.H., 1998 OK 61, ¶3, 967 P.2d 1178; Matter of Adoption of R.W.S.,see note 6, supra.

¶14 At the outset, we note that the relevant statutory period is from December 11, 1998, to February 11, 2000. During the relevant period the father has been incarcerated, denied visitation by a paternity order, and prohibited from contacting the mother and/or the child by a protective order. Because Maxwell relies on his incarceration and the court orders to excuse his lack of relationship with the child and prevent the adoption without his consent, we must decide whether, under 10 O.S. Supp. 1998 §7505-4.2(H),[8] the father's lack of communication and lack of relationship with the child was wilful within the intent of the statute, obviating the necessity of obtaining his consent to the adoption.

¶15 We have not previously applied §7505-4.2(H) in this context ------ circumstances in which a natural father, through his own fault, has placed himself in a position where he is not permitted by court orders to visit or communicate with his child and maintain a satisfactory relationship. However, in the Matter of Adoption of V.A.J., 1983 OK 23, 660 P.2d 139, this Court addressed whether the life imprisonment of a natural father for murder was sufficient per se to establish the child's eligibility for adoption without parental consent on the grounds of wilful failure to contribute to the support of the minor child. The section of the statute at issue in V.A.J. related to the failure of a parent to contribute to the child's support as a means for adoption without consent. It required wilful failure, refusal, or neglect to contribute to the support of a child for a period of twelve months prior to the filing of the petition for adoption.[9]

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[8]Title 10 O.S. Supp. 1998 §7505-4.2(H), see note 5, supra.

[9]Title 10 O.S. 1981 §60.6 provides in pertinent part:

"A legitimate child cannot be adopted without the consent of its

¶16 In V.A.J., the father's only source of income was a meager monthly stipend from his parents which would be granted or withdrawn at will. The Court held that incarceration alone is not enough to support termination of parental rights. This holding was consistent with the majority view from other jurisdictions.[10] Regarding whether failure to support was wilful and his parental rights could be terminated, the V.A. J. court said:

> "The statutory language of §60.6(3) is clearly devoid of any explicit legislative intent that imprisonment for any crime or for any duration afford a ground for dispensing with a parents consent. The statute requires wilful failure or refusal to contribute. Imprisonment cannot be equated with wilful failure to contribute to the child's support. The natural father's conduct was not to be deemed wilful when, as here, incarceration prevents his making any contribution to the child's support. The proper inquiry to address in this case is whether the natural parent intentionally incapacitated himself for the purpose of avoiding the duty imposed by law; if so, then imprisonment may constitute

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parents, if living, nor a child born out of wedlock without the consent of it mother, if living, except that consent is not necessary from a father or mother: . . .

(3) Who, for a period of twelve (12) months next preceding the filing of a petition for adoption of a child, has willfully failed, refused or neglected to contribute to the support of such child. . . ."

[10]See generally, G. Sarno, Annot. "Parent's Involuntary Confinement, or Failure to Care for Child as Result Thereof, as Permitting Adoption Without Parental Consent," 78 A.L.R.3d 712 (1977).

> justification for dispensing with his consent in the adoption proceeding. The evidence here does not support an inference that the father's commission of a felony, and subsequent incarceration therefore, was for the purpose of avoiding his support obligation. Thus his incapacity to earn income and pay support may not be deemed 'wilful.'"

¶17 V.A.J. involved the failure of a parent to contribute to the child's support as a means for adoption without consent. While incarceration of a parent during the relevant statutory period, standing alone, may not furnish a ground for automatic termination of parental rights, neither does incarceration insulate an inmate from the termination of parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent. Nevertheless, although parental rights may not be terminated solely for a parent's incarceration, parental incarceration and the reason for the incarceration ----- i.e. the nature of the crime committed as well as the person against whom the criminal act was perpetrated ------- are relevant to the issue of whether parental consent to an adoption is necessary. The question of intent is to be determined in each case from all of the facts and circumstances.

¶18 Decisions of other states are of limited value because they are based largely on different factual circumstances or on the particular language of statutes.[11] However, it is noteworthy

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[11]Although the circumstances here involve a natural father, who through his own fault, has placed himself in a position where he is not permitted by court orders to visit or communicate with his child and maintain a satisfactory relationship, we note that a few courts have concluded that an incarcerated parent's failure to

that several other courts when faced with non-consensual termination of parental rights have concluded that: 1) the parent's incarceration and the conduct which resulted in incarceration as well as the person against whom the criminal act is committed are factors which may be considered in determining whether parental rights should be terminated; 2) a parent's wilful criminal act and course of conduct can imply a conscious disregard and indifference to the child in respect to parental obligations that a parent owes to a child; and 3) intent is generally an inferred fact determined by conduct within the statutory period combined with relevant conduct

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communicate may not be considered wilful where the actions of other parties and not the conduct of the parent prevented the parent from communicating with the child. See, e.g., South Carolina Dept. of Social Serv. v. Wilson, 344 S.C. 332, 543 S.E.2d 580, 583 (S.C. App. 2001)[Parental rights should not have been terminated on alleged ground that parent failed to visit or support his children for six months because Department of Social Services actively prevented visitation.]; Peyla v. Martin, 40 Ill.App.3d 373, 352 N.E.2d 407, 410-11 (1976) [Parole officer's instruction to parolee-parent not to seek visitation with children and refusal to grant parolee-parent's request for travel permits precluded finding of parent's wilful failure to maintain interest in child.]. In re Taylor, 30 Ill. App. 3d 906, 334 N.E.2d 194, 196 (1975) [Where mother's efforts to contact her children had been frustrated by the Department of Children and Family Services, lack of contact between mother and children would not support Department's claim that the parent was unfit solely because she did not contact her children.]; But see, State in Interest of M.C., 320 Utah Adv. Rep. 8, 940 P.2d 1229, 1234-35 (1997)[Mother's incarceration did not represent wilful conduct justifying termination of her parental rights when she was precluded by court order from maintaining contact with children, or any adults having custody of her children during period of incarceration.].

both before and after such period.[12]

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[12]See, e.g., Crawford v. Arkansas Dept. of Human Serv. 330 Ark. 152, 951 S.W.2d 310, 312 (1997) [Nature of the crime itself is relevant factor in addition to conduct during incarceration.]; In re Interest of L.V., 240 Neb. 404, 482 N.W.2d 250, 260-61 (1992) [Termination sought based on intentional abandonment of child for six months or more immediately prior to the filing of the petition. Question of abandonment was largely one of intent to be determined from all of the facts and circumstances. The court affirmed the non-consensual termination of a parent's parental rights who embarked on despicable conduct, an intentional act which evidenced disregard for the parent-child relationship and welfare of the child, not to mention the victim. The parent's conscious decisions supply circumstances for the conclusion that he had abandoned the child.]; Matter of J.J.J., 718 P.2d 948, 952 (Alaska 1986)[For a non-custodial parent to block a stepparent adoption he or she must have maintained meaningful contact unless prevented by doing so by circumstances beyond the non-custodial parent's control. Circumstances resulting from the non-custodial parent's own conduct cannot excuse such a parent's significant failure to provide support or maintain meaningful communication.]; Matter of Interest of Pawling, 101 Wash.2d 392, 679 P.2d 916, 919-20 (1984)[To determine whether a parent has abandoned a child under circumstances showing a wilful substantial lack of regard for parental obligations, parent's incarceration, conduct resulting in incarceration, and person against whom criminal act committed are factors to be considered.]; In Interest of F.H., 283 N.W.2d 202, 213 (N.D. 1979)[Incarceration alone is not a defense to abandonment, nor is does is per se constitute abandonment. However, abandonment may rest upon confinement coupled with other factors, such as parental neglect, withholding affection, no contact, no support, financial or otherwise and disregard for the general welfare of the child.]; Zgleszewski v. Zgleszewski, 260 Ark. 29, 542 S.W.2d 765, 768 (1976) [Wilful criminal acts and the course of conduct followed thereafter indicate a conscious disregard to children and an indifference to their welfare tantamount to voluntary abandonment.]; Hamby v. Hamby, 264 S.C. 614, 216 S.E.2d 536, 538 (1975) [Voluntary acts which resulted in repeated imprisonment, failure to support and negligible contact with child support the inference that parent was guilty of such conscious disregard of indifference to parental obligations as to evince a settled purpose to forego obligations and duties to child.]. In re

¶19 Parental obligations entail minimal attributes such as: 1) expression of love and affection for the child; 2) expression of personal concern over the health, education and general well-being of the child; 3) the duty to supply necessary food, clothing, and medical care; 4) the duty to provide adequate domicile; and 5) the duty to furnish social and religious guidance.[13] Maxwell was incarcerated for stalking and assaulting the mother and violating a protective order which was entered to protect the child and its mother from his

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Staat, 287 Minn 501, 178 N.W. 2d 709, 712 (1970)[Fact of imprisonment may combine with other factors such as parental neglect and a withholding of parental affection.] In re A.B.M., 17 S.W. 3d 912, 915 (Mo. App. S.D. 2000)[Abandonment focuses on the parties' intent taking into consideration all evidence of the parent's conduct before and after the applicable statutory period.]; H.W.S. v. C.T., 827 S.W.2d 237, 241 (Mo. App. E.D. 1992)[Intent regarding abandonment or neglect is an inferred fact, determined by conduct which may have occurred before, after, or during the six-month statutory period. Nature of crime is a relevant factor especially if it is disintegration of the family unit.]; In re Juvenile Appeal, 2 Conn. App. 705, 483 A.2d 1101, 1104 (1984) [Incarceration of a parent alone does not constitute abandonment or cause for termination of parental rights. However, it is different when a parent is incarcerated because he has, by his own actions, not only terrorized his children, but denied them a maternal relationship]; Matter of Adoption of Doe, 99 N.M. 278, 657 P.2d 134, 137 (N.M. App. 1982)[In determining whether father who murdered child's mother had neglected and abandoned child, incarceration coupled with other factors such as neglect, lack of affection, failure to maintain a relationship, and failure to provide financial support for a child may be considered.]; South Carolina Dept. of Social Serv. v. Parker, 336 S.C. 248, 519 S.E.2d 351, 355 (S.C. App. 1999)[A parent's conduct which evinces a settled purpose to forego parental duties may fairly be characterized as wilful because it manifests a conscious indifference to the rights of the child to receive support and consortium from the parent.].

[13] Matter of Interest of Pawling, see note 12, supra.

acts of violence. Here, the father clearly never assumed his responsibilities as a parent nor did he attempt to foster a healthy, loving, and supportive relationship with his child. Rather, since the child's birth, he has embarked on intentional acts which evidence a total disregard for the parent-child relationship and the welfare of the child. His conduct which resulted in incarceration was in direct contradiction to basic parental obligations. Maxwell's conscious decisions supply the circumstances for the conclusion that he did not intend to establish or maintain a significant relationship with the child. Consequently, we hold that the father may not rely on the existence of the court orders to excuse his lack of relationship with the child.

¶20 Considering all aspects of the father's intentional conduct, the evidence clearly and convincingly establishes that the father wilfully failed to maintain a significant relationship with the child through visitation or communication for a period of twelve consecutive months out of the last fourteen months immediately preceding the filing of the petition for adoption. This situation is obviously within the intention of 10 O.S. Supp. 1998 §7505-4.2(H).[14] The state, through its Legislature, has wide power with respect to the rights of parents over their children which affect the welfare of the

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[14]Title 10 O.S. Supp. 1998 §7505-4.2(H), see note 5, supra. The Legislature could have, but did not address the effect of court orders and whether they may be considered when determining whether a parent wilfully neglected to maintain significant relationship with the child. See e.g., S.C. Code Ann. §20-7-1572 (Supp. 2000) which provides that it "must be shown that the parent was not prevented from visiting by the party having custody or by court order" when determining a parent's wilful failure to visit.

child.[15] In order to protect the integrity of the home and natural bond between parent and child,[16] a strict construction of adoption statutes is required.[17] However, the Legislature has provided that parental rights must yield when the welfare of the child so demands.[18] The record establishes that the trial court's determination is supported by the requisite clear and convincing evidence.

II.

¶21 THE TRIAL COURT'S DETERMINATION THAT THE ADOPTION WAS IN THE BEST INTERESTS OF THE CHILD IS SUPPORTED BY THE EVIDENCE.

¶22 In addition to the statutory requirements, this Court has also required that the adoption and termination of parental

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[15]Carignan v. State, 1970 OK 82, ¶10, 469 P.2d 656.

[16]Matter of Adoption of R.R., see note 3, supra; Matter of Adoption of C.M.G., see note 3, supra; Mann v. Garrette, 1976 OK 170, ¶9, 556 P.2d 1003.

[17]Matter of Adoption of R.R., see note 3, supra; Matter of Adoption of C.M.G., see note 3, supra; Adoption of Robin, 1977 OK 219, ¶25, 571 P.2d 850.

[18]Carignan v. State, see note 15, supra; See, Mahan v. Moore, 1946 OK 352, ¶8; 175 P.2d 345 [Title 10 manifests the Legislature's care for the welfare of children subject to adoption.]. The welfare of the child will not be ignored. In re Adoption of Graves, 1971 OK 15,¶16, 481 P.2d 136; Conville v. Bakke, 1964 OK 111, ¶22, 400 P.2d 179 [The adoption statute is strictly construed in favor of rights of natural parents when the controversy is between the natural parents and persons seeking to destroy their parental status, but the welfare of the child is not to be ignored in considering the validity of the adoption proceedings.].

rights be in the best interests of the child.[19] Maxwell argues that there was insufficient evidence to support the trial court's determination that the adoption was in the best interests of the child.[20] The Wyman's insist that the trial court's determination that the adoption was in the child's best interests was supported by the evidence.

¶23 The primary issue in adoption is whether the adoption will promote the best interests of the child.[21] It is the duty of the trial court in adoption matters to determine whether the adoption would be in the child's best interests.[22] In an adoption proceeding, the decision of the trial court need not

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[19]Matter of Adoption of Baby Boy W., 1992 OK 58, ¶13, 831 P.2d 643.

[20]We note that the Court of Civil Appeals held that the issue of whether the father wilfully failed to maintain a significant relationship with the child was dispositive. Consequently, it did not reach the issue of whether the trial court's determination that the adoption was in the child's best interest was supported by the evidence. When this Court vacates the opinion of the Court of Civil Appeals, we may address any issue properly raised in the appeal or remand the cause to the Court of Civil Appeals for that court to address such an issue. Rule 1.80, 12 O.S. Supp. 1997, Ch. 15, App. 1, Oklahoma Supreme Court Rules. Hough v. Leonard, 1993 OK 112, ¶18, 867 P.2d 438.

[21]State ex rel. Department of Inst., Social and Rehabilitative Serv. v. Griffis, 1975 OK 164, ¶20, 545 P.2d 763, 83 A.L.R.3d 373; In re Adoption of Greer, 1969 OK 163, ¶13, 463 P.2d 677; Wade v. Mantooth, 1966 OK 121, ¶0, 417 P.2d 313.

[22]Matter of Adoption of G.D.L., 1987 OK 115, ¶17, 747 P.2d 282; State ex rel. Department of Inst., Social and Rehabilitative Serv. v. Griffis, see note 21, supra.

rest on uncontradicted evidence.[23] The trial court is in the best position to evaluate credibility of witnesses,[24] and is therefore entitled to deference on issues of fact.[25]

¶24 The record reflects that the stepfather has been an active part in the child's life since the child was an infant. The stepfather and child have a strong bond and a close relationship. The child has been a member of the Wyman family since 1998, and he calls his stepfather "Daddy" and considers him to be his father. The Wymans had a daughter and the child considers her his sister and he refers to himself with the last name "Wyman." The child does not know Maxwell at all or recognize Maxwell's family members as relatives. It appears that the love and consideration and the responsibility of a parent for a child has been given by the mother and stepfather and that the stepfather provides all of the child's financial support.

¶25 Even though the guardian ad litem recognized that the mother was not free from fault in alienating the child from his father, he nevertheless expressed concern that the father's reaction to the mother's efforts to alienate the child was extreme, to the extent of having a Victim Protective Order entered against him which he knowingly, wilfully, wantonly

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[23]Matter of Adoption of A.W.H., 1998 OK 61, ¶4, 967 P.2d 1178; Mueggenbord v. Walling, 1992 OK 121, ¶9, 836 P.2d 112.

[24]White v. Adoption of Baby Boy D., 2000 OK 44, ¶36, 10 P.3d 212.

[25]Matter of Adoption of A.W.H., see note 7, supra; Mueggenbord v. Walling, see note 23, surpa.

violated not once, but twice resulting in four criminal charges being filed. Although he also expressed concern that the stepfather had a child with whom he voluntarily chose not to pursue a relationship, the guardian ultimately recommended that it was in the child's best interests to allow the adoption to proceed.

¶26 In contrast, the father presented evidence that he was a good father to his other four children because he spent some time with them and that he loved this child too. Although Maxwell insists that before his relationship with the mother ended, he at least provided some emotional support for the mother before and shortly after the child's birth and cared for the child occasionally, it appears that rather than demonstrating a full commitment to the responsibilities of parenthood by participating in the rearing of the child,[26] he instead chose to spend any opportunity he could to pressure

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[26]See, In re Termination of Parental Rights of Biological Parents of Baby Boy W., 1999 OK 74, ¶10, 988 P.2d 1270 [Only when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child does his interest with his child acquire substantial protection under the due process clause.]; Matter of Adoption of Baby Boy D., 1985 OK 93, ¶45, 742 P.2d 1059, cert denied., Harjo v. Duello, 484 U.S. 1072, 108 S.Ct. 1042, 98 L.Ed. 2d 1005 (1988)[Due process protects only the parent child relationships of biological parents who have actually committed themselves to their children and have exercised responsibility for rearing their children.]; Matter of Adoption of Baby Girl M, 1997 OK CIV.APP. 33, ¶46, 942 P.2d 235 [The Legislature has enacted a series of statues designed to protect both biological fathers who demonstrate sufficient indicia of responsibility toward their progeny balanced against protection of the best interests of children whose parents do not demonstrate such responsibility.]. See also, White v. Adoption of Baby Boy D., note 24, supra [Father failed to grasp his opportunities to parent child and father failed to assume his parental responsibilities with regard to the child.].

the mother into resuming a relationship with him. The only attempts made by Maxwell to pursue any kind of contact or relationship with the child were illegal actions which ultimately necessitated a Victim Protective Order and which lead to his conviction for felony stalking and assault and battery on the mother. The trial court's finding that the best interests of the child would be served by approving the adoption and maintaining the child's current family unit are supported by the evidence. Consequently, we hold that the trial court did not err in finding that the adoption was in the best interests of the child.

CONCLUSION

¶27 Nonconsensual adoption may be obtained under 10 O.S. Supp. 1998 §7505-4.2(H)[27] if a parent wilfully fails to maintain a significant relationship with the child through visitation or communication for a period of twelve months out of fourteen month immediately preceding the filing of the petition for adoption. The burden is on the party seeking to adopt without consent to prove such adoption is warranted by clear and convincing evidence.[28] The decision of the trial court will not be disturbed unless it fails to rest on clear and convincing evidence.[29]

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[27]Title 10 O.S. Supp. 1998 §7505-4.2(H), see note 5, supra.

[28]White v. Adoption of Baby Boy W., see note 6, supra; Matter of Adoption of R.W.S., see note 6, supra; Matter of Adoption of J.R.M., see note 6, supra.

[29]White v. Adoption of Baby Boy W., see note 6, supra; Matter of Adoption of A.W.H., see note 7, supra; Matter of Adoption of R.W.S.,see note 7, supra.

¶28 When a parent is incarcerated during the relevant statutory period, the question of intent is to be determined in each case from all of the facts and circumstances including the nature of the crime committed as well as the person against whom the criminal act was perpetrated. A father who was denied visitation and who was incarcerated for stalking and assaulting the mother and violating a protective order which was entered to protect the child and its mother from the father's acts of violence may not rely on the existence of court orders to excuse his lack of relationship with the child. The trial court's determination that the best interests of the child would be served by approving the adoption and maintaining the child's current family unit is supported by the evidence.

COURT OF CIVIL APPEALS OPINION VACATED; TRIAL COURT AFFIRMED.

¶29 WATT, V.C.J., HODGES, KAUGER, SUMMERS, WINCHESTER, JJ. concur.

¶30 HARGRAVE, C.J., LAVENDER, OPALA, BOUDREAU, JJ. dissent.

APPENDIX "D"

DISSENT FILED DECEMBER 4, 2001

FOR OFFICIAL PUBLICATION

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN THE MATTER OF THE, ADOPTION OF C.D.M., a, minor child, KORI RENE, WYMAN and DAVID LEE, WYMAN,	)	
Petitioners/Appellees,	)	No. 94,879
v.	)	
CHAD LOUIS MAXWELL,	)	
Respondent/Appellant.	)	

OPALA, J., with whom HARGRAVE, C.J. and LAVENDER, J., join, dissenting.

¶1 The court holds today that neither a father's incarceration nor his previous court-ordered bar of visitation will provide a defense against a mother's complaint of his willful failure to maintain a relationship with his child, a ruling which, pursuant to the terms of 10 O.S. Supp. 1998 § 7505-4.2(H),[1] may

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[1] The pertinent terms of 10 O.S. Supp. 1998 § 7505-4.2(H) provide:

"Consent to adoption is not required from a parent who willfully

result in the nonconsensual termination of paternal status. Today's pronouncement is fraught with state and federal constitutional infirmities. Insofar as the court's ruling deprives the father of his interposed defense of lack of willfulness, it denies him unimpeded access to court[2] and due process[3]

> fails to maintain a significant relationship with a minor through visitation or communication for a period of twelve (12) consecutive months out of the last fourteen (14) months immediately preceding the filing of a petition for adoption of the child."
>
> (Emphasis supplied).

[2] The terms of Art. 2 § 6, Okl. Const., state:

> "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

A ruling barring one from the access to court which is essential to the relief sought is violative of Art. 2, § 6, Okl. Const., Carter v. Carter, 1989 OK 153, ¶ 2, 783 P.2d 969, 970.

[3] The text of Art. 2 § 7, Okl. Const., provides:

> "No person shall be deprived of life, liberty, or property without due process of law."

The pertinent provision of U.S. Const. amend. XIV § 1 states:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

Depriving a child-support or alimony obligor from participation in judicial proceedings for failure to pay support constitutes a denial of due process. Carter, supra note 2, at ¶ 2, at 970 (citing Bishop v. Bishop, 1958 OK 16, ¶ 18, 321 P.2d 416, 417 and Hovey v. Elliott, 167 U.S. 409,

affordable under the state and federal fundamental charters. There is no indication in the pertinent statute of legislative intent to sanction either complete destruction or even an abridgment of this father's defense based on his lack of willfulness.[4] Today's pronouncement that rules out that defense is arbitrary and impermissible.[5] When a court circumscribes the range of plainly admissible probative facts to show the absence of willfulness, due process is offended.[6]

444, 17 S.Ct. 841, 854, 42 L.Ed. 215 (1897)). Early jurisprudence recognized that due process signifies, at minimum, one's right to participate in judicial proceedings and to be given a meaningful opportunity to be heard. Hovey, supra, 167 U.S. at 417, 17 S.Ct at 844.

[4]The statutory ground upon which the termination proceeding is rested plainly calls for proof of willful neglect. For the text of 10 O.S. Supp. 1998 § 7505-4.2(H) see supra note 1.

[5]The range of critical defense evidence cannot be restricted without offending traditional and fundamental standards of due process. Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.E.2d 297 (1973); Davis v. Alaska, 415 U.S. 308, 319-20, 94 S.Ct. 1105, 1112, 39 L.Ed.2d 347 (1974).

[6]The U.S. Constitution guarantees all defendants a meaningful opportunity to be heard in order to present a complete defense. Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) (citing California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). Rules that exclude defense evidence are unconstitutionally arbitrary or disproportionate where they infringe upon a weighty interest of the defendant. United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct 1261, 1264, 140 L.Ed.2d 413(1998) (citing Rock v. Arkansas, 483 U.S. 44, 56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987). Due process is violated by the exercise of judicial power in an action which was not reasonably calculated to inform interested parties of its pendency. It logically follows that due process is also violated by the exercise of judicial power in an action where a party is not given a

The tone of today's opinion - pronouncing that the father "may not rely on the existence of court orders to excuse his lack of relationship with the child"[7] - denies him full opportunity to explore all available facts that are probative of his lack of willfulness. Today's ruling operates significantly to restrict his access to the courts for establishing a statute-based defense against the mother's termination quest.

¶2 The common law knows not of judicial severance of a parental tie.[8] Parental relationship is viewed as eternal, indestructible and hence incapable of dissolution.[9] Because the common law does not allow the parent-child bond to be severed, courts cannot alter this status-based relationship without a faithful obedience of the statutory terms.[10] Today

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reasonable opportunity to be heard. Johnson v. Scott, 1985 OK 50, ¶ 11, 702 P.2d 56, 59. Minimum standards of due process require that persons be afforded not only notice but also an opportunity to be heard before any of their substantial rights may be altered or affected. Patel v. OMH Medical Center, Inc., 1999 OK 33, ¶ 39, 987 P.2d 1185, 1200 n.56 (citing Matter of Estate of Pope, 1990 OK 125, ¶ 3, 808 P.2d 640, 642-43).

[7] Referencing the opinion of the court.

[8] Davis v. Davis 1985 OK 85, ¶ 20, 708 P.2d 1102, 1111 (abrogated by subsequent legislation and then overruled on other grounds).

[9] Id.

[10] The text of 25 O.S. 1991 § 29 states:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to the laws of this state, which are to be liberally construed with a

we are creating a termination neither sanctioned by legislation nor cognizable at common law.

¶3 Proceedings to terminate one's recognized family status present matters of grave consequence. Constitutional law surrounds both the marital as well as the parental status with a panoply of protections. Consistently with the obligations imposed by the due process clause, indigent individuals seeking dissolution of a marital bond are entitled to court access at the expense of the government,[11] and parental-status termination decrees are constitutionally infirm unless they be based on clear and convincing proof.[12] A state does not act in a manner consistent with the due process and equal protection clauses,[13] when it conditions, based on the litigant's ability to pay, a parent's access to appellate review of a decree that destroys parental rights.[14]

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view to effect their objects and to promote justice."

Liberal construction of a statute is not a device for extending the ambit of an enactment beyond its intended scope. Davis, at ¶ 20, at 1111.

[11]Boddie v. Connecticut, 401 U.S. 371, 374, 91 S.Ct. 780,784, 28 L.Ed.2d 113 (1971).

[12]Santosky v. Kramer, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 1391-92, 71 L.Ed.2d 599 (1982).

[13]The pertinent provision of U.S. Const. amend. XIV § 1 states:

"[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

[14]M.L.B. v. S.L.J., 519 U.S. 102, 102, 117 S.Ct 555, 556, 136 L.Ed. 2d 473 (1996).

¶4 Parental terminations are, perhaps, the most serious of all status-based bond severance proceedings. Federal due process and equal protection afford safeguards protecting familial associations. Oklahoma also surrounds all access to courts with constitutional shelter.[15] Yet, today's pronouncement severely abridges this father's recognized federal- and state-law shields by fashioning a short-cut to termination that is neither legislatively sanctioned nor cognizable at common law. I hence recede from today's pronouncement because it (a) severely abridges this litigant's statute-based opportunity to defend against the mother's severance quest by demonstrating that one indispensable probative element is absent from the evidence she adduced in the proceeding - that of willful failure "to maintain a significant relationship with a minor through visitation or communication . . ." and (2) invites as well as licenses the use of public law's quasi-criminal process regime (victim protection orders) as a designing custodial parent's collateral weapon for orchestrating the destruction of the noncustodial sire's legal status.

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[15]For the text of Art. 2 §6 see supra note 2.

Supreme Court, U.S.
FILED
APR 3 2002
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No. 01-1281

In The

Supreme Court of the United States

CHAD LOUIS MAXWELL,

Petitioner,

vs.

KORI RENE WYMAN, *et vir,*

Respondents.

On Petition For A Writ Of Certiorari To The Oklahoma Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LAURA HAAG MCCONNELL
Counsel of Record for Respondents
HARTZOG CONGER CASON & NEVILLE
201 Robert S. Kerr Avenue
1600 Bank of Oklahoma Plaza
Oklahoma City, Oklahoma 73102
(405) 235-7000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I. Whether the Oklahoma Supreme Court's interpretation of Tit. 10 Okla. Stat. § 7505-4.2 is contrary to the laws of this Court and therefore subject to review by Writ of Certitorari.

II. Whether the Oklahoma Supreme Court's interpretation of Tit. 10 Okla. Stat. § 7505-4.2 is in conflict with the settled law of other states and therefore subject to review by Writ of Certiorari.

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STATEMENT OF THE CASE

This case arose from the trial court's determination that the minor, CDM (now age 6), was eligible for adoption without the consent of his biological father. The evidence at trial was undisputed that the biological father has had no relationship of any kind with CDM since CDM was six months old. CDM was born out of wedlock.

In August 1996, a Permanent Protective Order (the "VPO") was entered against Petitioner in favor of the Mother, Kori Wyman, and CDM after Petitioner became intoxicated and forcibly took and threatened the child in an effort to detain the Mother. The VPO instructed Petitioner not to visit or communicate with either the Mother or CDM. However, the VPO specified on its face that it could be modified by an assigned judge in any domestic proceeding between the parties. Petitioner never asked that the VPO's constraints on communication with the child be modified, although he participated in a paternity proceeding in which he was represented by counsel.

In March 1997, Petitioner was arrested and charged with criminal trespass on the property of the Mother, stalking, repeatedly following and telephoning the Mother, breaking into the apartment of the Mother and hiding in her closet, and violating the VPO. (Petitioner admitted during the trial in the instant matter that he had broken into the Mother's apartment on at least one previous occasion for which he was not caught.) Thereafter, in August 1997, Petitioner assaulted and battered the Mother in a convenience store parking lot and attempted to take CDM forcibly from her car. This criminal assault on the Mother occurred in the presence of the child.

Petitioner was found guilty on these felony stalking and assault and battery charges, and he was sentenced to prison. For unknown reasons, the authorities failed to take Petitioner into custody to begin serving his prison sentence until November 1998.

In June 1997, Petitioner filed a Petition to Establish Paternity and Request for Visitation with CDM. This was the first attempt made by Petitioner to modify the limitations of the VPO. In October 1997, a Temporary Order was entered which denied Petitioner visitation with CDM. The Temporary Order did not address written or telephonic communication between Petitioner and CDM, but Petitioner never asked that the VPO be modified to allow any written or telephonic communication between Petitioner and CDM. It was clear to all concerned that Petitioner's true motivation was to have contact with the Mother rather than to establish a relationship with CDM. Petitioner, through his counsel, ultimately executed an Agreed Decree of Paternity which denied him visitation with CDM and which did not address any other forms of communication between Petitioner and CDM.

During all of the relevant period of December 11, 1998 to February 11, 2000, the Petitioner was incarcerated for felony stalking of the Mother and violation of the VPO and for assault and battery of the Mother. Petitioner had access to telephones and postal facilities while he was incarcerated. However, he had no contact whatsoever with CDM during the relevant period, and he did not ask the court to allow such contact.

Petitioner was given notice of the Petition to Determine the Child Eligible for Adoption Without His Consent, and he appeared at trial with counsel. Petitioner participated fully in the bifurcated proceeding. First, the trial court heard evidence regarding whether the Petitioner had willfully failed to establish a significant relationship with CDM. Petitioner stipulated that he had no relationship with CDM whatsoever since CDM was six months old. Petitioner merely attempted to prove that his failure to establish a relationship with CDM should be excused as non-willful because he was serving his prison sentence arising from his conviction for criminal acts directed at the Mother and CDM. The trial court heard and considered his evidence and found that, based on the facts and circumstances of this case, Petitioner had willfully failed to establish a significant relationship with the child.

Second, the trial court conducted a trial on the issue of the best interest of the child. Petitioner fully participated in this trial, including testifying and calling witnesses. All parties and the child were represented by counsel. The adoptive father had raised CDM since he was an infant, provided all of his financial support, and was the only father CDM had ever known. After a full trial on this issue, the trial court found that the adoption was in the best interest of the child.

ARGUMENT

PROPOSITION I

The Oklahoma Supreme Court's decision was consistent with the Fourteenth Amendment and relevant decisions of this Court.

The rules of this Court provide that writs of certiorari should be granted only for compelling reasons. Sup. Ct. R. 10. Indicative of the character of a case warranting review is a state court of last resort who has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c). Petitioner contends that the Oklahoma Supreme Court's decision violated his rights under the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV, § 1. An essential component of procedural fairness is the opportunity to be heard. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

This Court has held that the Federal Constitution provides protections to an unwed father who comes forward "to participate in the rearing of his child." *Caban v. Mohammed*, 441 U.S. 380, 392 (1979). Only at that point may it be said that he "act[s] as a father toward his children." *Id.* at 389. Further, a biological father who fails to grasp the opportunity for a relationship with the child and who fails to accept some measure of responsibility for the child's future does not earn constitutional protections. *Lehr v. Robertson*, 463 U.S. 248 (1983). This only makes logical sense, given that the Court is attempting to balance the rights and protections of the child as well as the parents.

In the instant action, the Oklahoma Supreme Court upheld the trial court's termination of Petitioner's parental rights on the basis that Petitioner willfully failed to maintain a significant relationship with CDM through visitation or communication for a period of 12 consecutive months, pursuant to Tit. 10 Okla. Stat. § 7505-4.2(H) (Supp. 1998). Petitioner asserts that he was effectively denied his opportunity to be heard because the Oklahoma Supreme Court rejected his argument that he had an absolute defense to the action based on the circumstance of his incarceration or the VPO.

Petitioner, however, mischaracterizes the proceedings below. The trial court entered an order allowing for termination of Petitioner's parental rights after considering all of the evidence presented by both parties. The trial court found that the specific facts of this case showed by clear and convincing evidence that Petitioner had willfully failed to maintain a significant relationship with the child. The stipulated facts presented to the trial court included: (1) Petitioner has had no relationship of any kind with CDM since the child was six months old; (2) Petitioner, due to his own threatening and illegal conduct toward the Mother and CDM, had a VPO placed against him ordering him not to contact the Mother or child; (3) Petitioner, due to his own threatening and illegal conduct towards the Mother and child in violation of the VPO, was incarcerated after he assaulted the Mother in the presence of the child, attempted to take the child, and broke into the Mother's home; and, (4) the VPO provided that at any time Petitioner could seek modification of the protective order but Petitioner failed to make any request to the Court to modify the protective order so as to allow

communication with the child during the relevant time period.

Contrary to the assertions of Petitioner, the Oklahoma Supreme Court did not hold that incarceration of a parent in and of itself provided grounds for termination of parental rights. Rather, consistent with the Court's precedent, the Oklahoma Supreme Court held as follows:

> While incarceration of a parent during the relevant statutory period, standing alone, may not furnish a ground for automatic termination of parental rights, neither does incarceration insulate an inmate from the termination of parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent. Nevertheless, although parental rights may not be terminated solely for a parent's incarceration, parental incarceration and the reason for the incarceration – i.e., the nature of the crime committed as well as the person against whom the criminal act was perpetrated – are relevant to the issue of whether parental consent to an adoption is necessary. The question of intent is to be determined in each case from all of the facts and circumstances.

App. C to Petition for Certiorari at 12. In affirming the trial court's termination of Petitioner's parental rights, the Court specifically relied on several facts, including the fact that the only attempts made by Petitioner to pursue any kind of contact with the child were illegal actions and that the reasons for both the VPO and his incarceration stemmed from threatening conduct toward both the child and Mother. Petitioner was given the opportunity to present his defense that his incarceration

and the pending VPO prevented him from maintaining a significant relationship with CDM during the relevant time period; however, the court gave little weight to this argument in light of the compelling facts and circumstances in this particular case. The Oklahoma Supreme Court concluded:

> When a parent is incarcerated during the relevant statutory period, the question of intent is to be determined in each case from all of the facts and circumstances including the nature of the crime committed as well as the person against whom the criminal act was perpetrated. A father who was denied visitation and who was incarcerated for stalking and assaulting the mother and violating a protective order which was entered to protect the child and its mother from the father's acts of violence may not rely on the existence of court orders to excuse his lack of relationship with the child.

App. C to Petition for Certiorari at 22.

This case presents a situation in which the biological father clearly has no federal constitutional protections. Due to his own inaction and criminal malfeasance, Petitioner has insured that the child has no relationship with him whatsoever, other than a genetic link. "But the mere existence of a biological link does not merit equivalent constitutional protections." *Lehr*, 463 U.S. at 261.

Nevertheless, the procedural safeguards in place throughout these proceedings actually provided Petitioner all of the due process rights he would have enjoyed had he earned such constitutional protections, including an opportunity to be heard and present his defense. Petitioner seeks review from this Court because he disagrees

with the weight afforded his defense by the Oklahoma Supreme Court. However, as the rules of this Court indicate, a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. Thus, review of the instant case is clearly unwarranted. Petitioner has not presented this Court with a sufficiently compelling basis for granting certiorari. He is unable to demonstrate that the Oklahoma Supreme Court in this instance decided an important federal question in a way that conflicts with relevant decisions of this Court.

PROPOSITION II

The Oklahoma Supreme Court's decision does not present a conflict with other states necessitating review by this Court.

The Rules of this Court provide that granting certiorari may be appropriate where a state court of last resort has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort. Sup. Ct. R. 10(b). Petitioner contends that the Oklahoma decision interpreted a fundamental constitutional right in a manner that conflicts with decisions of South Carolina, Utah, Alaska, Florida, Indiana, Pennsylvania, and Texas. However, Petitioner has misstated the Oklahoma Supreme Court's decision as well as the controlling law in each of these states. In each of the states listed by Petitioner, the law permitting termination of parental rights on the basis of willful abandonment or desertion while in prison has been interpreted in a manner wholly consistent with the Oklahoma Supreme

Court's decision. Each of these jurisdictions has held that while incarceration, standing alone, may not provide a basis for abandonment, incarceration *and the circumstances surrounding the incarceration* may provide a basis for termination of parental rights due to abandonment or lack of meaningful contact.

With respect to South Carolina, Petitioner cites to S.C. Code Ann. § 20-7-1572(3) which provides that parental rights may be terminated on the ground that the parent has willfully failed to visit the child. This section further provides that in order to terminate parental rights on this basis, it must be shown that the parent was not prevented from visiting by the party having custody or by court order. The South Carolina Supreme Court in interpreting and applying this section has recognized that a parent who is incarcerated during the relevant statutory time may have their parental rights terminated under this section, finding that incarceration coupled with additional circumstances could warrant a finding of willful failure to visit the child. *Dep't of Soc. Servs. v. Henry*, 296 S.E.2d 298, 299-300 (S.C. 1988) (finding "voluntary pursuit of a course of lawlessness resulting in imprisonment, coupled with flagrant indifference towards the children during intervening periods of freedom, manifests abandonment"); *Hamby v. Hamby*, 216 S.E.2d 536, 538-39 (S.C. 1975) (finding willful lack of contact after considering all of the surrounding circumstances, including the voluntary nature of the criminal act and its consequences and the nature of the parent-child relationship during times when the father was not incarcerated); *see also South Carolina Dep't of Soc. Servs. v. Wilson*, 543 S.E.2d 580,

583-84 (S.C. 2001) ("To determine whether a parent's failure to support or visit during the time of incarceration evinces a settled purpose to forego parental responsibilities requires a comprehensive analysis of all of the facts and circumstances.") (internal citations omitted).

Likewise, the Utah courts have held that while incarceration of a parent, standing alone, does not provide a basis for a finding of willful desertion, certain circumstances surrounding the incarceration may provide a sufficient basis. *Utah v. KHC*, 940 P.2d 1229, 1234-35 (Utah Ct. App. 1997) (recognizing that a trial court could permissibly find incarcerated parent had voluntarily failed to maintain contact with a child if while incarcerated he failed to communicate through available means such as mail and telephone). The Supreme Court of Alaska has held that the issue to be addressed in evaluating the willfulness of an incarcerated parent's lack of contact with a child is "whether the constraints [i.e., incarceration] imposed on [the parent] were the result of his own conduct, in which case his failure to communicate would not be justifiable, or were instead the result of circumstances over which he had no control." *In re J.J.J.*, 718 P.2d 948, 953 (Alaska 1986), *clarifying R.N.T. v. J.R.G.*, 666 P.2d 1036 (Alaska 1983). The Florida courts have found willful abandonment where an incarcerated parent made no attempts to communicate with the child via mail or telephone and never made any inquiries through friends or relatives as to the well-being of the child. *Turner v. Turner*, 352 So.2d 957, 959-60 (Fla. Dist. Ct. App. 1977). The Indiana courts have likewise found willful abandonment where an incarcerated parent had made no substantial effort to communicate with the child nor taken any legal

action to enable visitation or communication with the child. *Williams v. Townsend*, 629 N.E.2d 252, 253-54 (Ind. Ct. App. 1994). The Supreme Court of Pennsylvania found willful abandonment where the preponderance of the evidence revealed that while in prison, the parent did not take advantage of visitation rights nor make any sincere or persistent efforts to locate or inquire about the child. *In re McCray*, 331 A.2d 652, 655 (Pa. 1975). Lastly, the Texas courts recently found that a father who was incarcerated and made only two attempts to discover information about his child while he was in prison had willfully failed to maintain significant contact with his child and was thus subject to termination of his parental rights. *In re B.A.*, 2001 WL 578314 at *4 (Tex. Civ. App. May 31, 2001) (unpub. op.).

Each of these cases indicate that the various states noted by Petitioner have employed an analysis consistent with the Supreme Court of Oklahoma when evaluating whether parental rights of an incarcerated parent should be terminated without consent. All of these states, like Oklahoma, have concluded that while incarceration in and of itself is not a sufficient basis for finding willful abandonment (and thus grounds for termination of parental rights), incarceration may be considered in light of the surrounding circumstances in determining that abandonment of the child was intentional.

Each of these states, like Oklahoma, has balanced the rights and responsibilities of the parents and the children, recognizing that a biological father's rights are not paramount to the best interests of the child, and has set out appropriate standards to attempt to protect the rights of

all parties based on the particular circumstances of each case.

No conflict among the state courts exist with respect to this issue. Thus, review by this Court is unnecessary and unwarranted.

CONCLUSION

Accordingly, Respondents respectfully request this Court deny the petition for writ of certiorari so that this child may finally be adopted and fully and legally incorporated into the only home he has ever known.

Respectfully Submitted,

LAURA HAAG MCCONNELL
Counsel of Record for Respondents
HARTZOG CONGER CASON & NEVILLE
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr Avenue
Oklahoma City, OK 73102
(405) 235-7000
(405) 235-7329 (facsimile)